Supreme Court, U.S.
FILED

No. 03-

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IN THE OFFICE OF THE CLERK

Supreme Court of the United States

WIEN & MALKIN LLP as Supervisor and PETER L. MALKIN, individually and as Partner in and on behalf of EMPIRE STATE BUILDING ASSOCIATES, EMPIRE STATE BUILDING COMPANY, FIFTH AVENUE BUILDING ASSOCIATES, 200 FIFTH AVENUE ASSOCIATES, NAVARRE-500 BUILDING ASSOCIATES, 500-512 SEVENTH AVENUE ASSOCIATES, MARLBORO BUILDING ASSOCIATES 1359 BROADWAY ASSOCIATES, 112 WEST 34TH STREET ASSOCIATES, 112 WEST 34TH STREET COMPANY, SEVENTH AND THIRTY SEVENTY BUILDING ASSOCIATES, 501 SEVENTH AVENUE ASSOCIATES, 60 EAST 42ND STREET ASSOCIATES, LINCOLN BUILDING ASSOCIATES, 250 WEST 57TH STREET ASSOCIATES, FISK BUILDING ASSOCIATES, 1333 BROADWAY ASSOCIATES and 1400 BROADWAY ASSOCIATES,

Petitioners,

v.

HELMSLEY-SPEAR, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION – FIRST DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Citizens Bank v. Alafabco, Inc.*, 123 S. Ct. 2037, 2040 (June 2, 2003) (*per curiam*), this Court expressly rejected the view that the Federal Arbitration Act ("FAA") applies only to transactions which have a "substantial effect on interstate commerce", holding that the FAA applies to any transaction "affecting commerce". In a December 5, 2002 Decision and Order, however, the Supreme Court, Appellate Division, of the State of New York made the same error as the Alabama court in *Citizens Bank*: the court expressly refused to apply the FAA to a dispute involving the operation of major commercial properties in New York City, including the Empire State Building, because "the dispute at issue . . . does not have a substantial effect on interstate commerce". The New York court therefore declined to consider whether an arbitration award relating to those properties—an award the court itself recognized was "perhaps questionable"—was in "manifest disregard of the law", one of the bases for vacatur under the FAA; rather, the court confirmed the award because the court believed the award was not completely irrational, the applicable standard under state law.

The question presented is whether the Court should grant certiorari, vacate the judgment below, and remand the case for further consideration in light of *Citizens Bank*.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the Supreme Court, Appellate Division, of the State of New York in this case.

OPINIONS BELOW

The Arbitration Panel's "Partial/Final Award" (the "Award") (Appendix 10a-14a) is not otherwise published. The trial court's opinion (per Gammerman, J.) granting respondent's motion to confirm the Award (Appendix 3a-9a) is not otherwise published. The Supreme Court, Appellate Division, First Department's Decision and Order affirming confirmation of the Award (Appendix 1a-2a) is published at 300 A.D.2d 32, 751 N.Y.S.2d 21.

STATEMENT OF JURISDICTION

The New York Court of Appeals denied petitioners' motion for leave to appeal on April 8, 2003 (Appendix 15a-16a). This order is published at 99 N.Y.2d 511. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1257(a) and § 2106.

STATUTORY PROVISION INVOLVED

This petition for certiorari involves the Federal Arbitration Act of 1947, 9 U.S.C. § 2, which provides as follows:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole

> or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

This case involves critical issues relating to the management and operation of more than eight million square feet of commercial real estate in New York City, including global destination properties such as the Empire State Building and the International Toy Center. Indeed, the Arbitration Panel (the "Panel") whose award is under review itself recognized that the case is "of enormous importance not just to the parties but to a significant portion of the New York City business community" (R. 100).

The properties are owned and operated by partnerships/ LLCs that were created in the 1950's and 1960's by Lawrence A. Wien, the founder of petitioner Wien & Malkin, LLP ("Wien Malkin") and his son-in-law Peter L. Malkin, the current Chairman of Wien Malkin. The partnership agreements for these entities provide that Wien Malkin will have an ongoing supervisory role in partnership affairs, and recognize the original Helmsley-Spear, Inc. ("Helmsley-Spear" or "respondent") as managing agent of the properties (*e.g.*, R. 927). The agreements also provide mechanisms for the partners to terminate Helmsley-Spear, in some cases "for cause" and in others "without cause". (*E.g.*, R. 962, 987).

In June 1997, alarmed by the deterioration in Helmsley-Spear's ability to function as managing agent following the

death of Mr. Harry Helmsley, Mr. Malkin commenced this action seeking, *inter alia*, the removal of Helmsley-Spear as managing agent for these properties, as well as relief against Leona M. Helmsley, Mr. Helmsley's wife (R. 57, 65-70), who claimed to have succeeded to Mr. Helmsley's interest in the partnerships. Mr. Malkin also sought and received proxy votes from partners in several of the partnerships authorizing removal of Helmsley-Spear. On September 4, 1997, the Supreme Court, New York County granted respondent's motion to compel arbitration.

Later in September 1997, Mrs. Helmsley and Messrs. Irving Schneider and Alvin Schwartz, two longtime Helmsley-Spear executives, entered into a series of agreements resolving their own long-standing differences. Two aspects of these agreements present the central substantive issues of petitioners' lower court appeals: (1) Helmsley-Spear's undisclosed assignment of the contracts to manage these properties to a new entity called "Newco", subsequently renamed "Helmsley-Spear", without the knowledge or consent of the partnerships or Wien Malkin; and (2) Mrs. Helmsley's concealed grant of an irrevocable proxy to non-partner "Newco" to vote her general partner interest on the retention of Newco/Helmsley-Spear at eight of the partnership properties, including the Empire State Building (the "Helmsley Voting Agreement"). (R. 360-62).

The arbitration commenced in late 1997. Petitioners asserted, among other things, that Helmsley-Spear should be terminated as managing agent at all of the properties for cause; that certain partnerships validly had voted to terminate Helmsley-Spear without cause; that Mrs. Helmsley's wholesale transfer of her general partner voting rights to non-partner Newco was invalid under New York partnership law;

and that the undisclosed assignment of the property management contracts—which are personal services contracts, *e.g.*, *Security Pacific Mortgage & Real Estate Servs., Inc. v. Canadian Land Co.*, 690 F. Supp. 1214, 1221 (S.D.N.Y. 1988) (interpreting "a contract for the personal services of a managing agent")—was unlawful. Respondent filed counterclaims asserting that Wien Malkin had committed various ethical improprieties. (R. 95-98).

On March 30, 2001, three and one-half years after the proceeding began, the Arbitrators issued a 134-page "Partial/ Final Award". In pertinent part, the Award upheld the undisclosed assignment of the property management agreements to Newco, holding without any reasoning or citation to authority that this was a "technical matter" (R. 210). Moreover, though respondent itself had taken the position that "[u]nder Section 53(1) of the Partnership Law, a partner may not assign management rights", the Award nonetheless upheld the Helmsley Voting Agreement by which Mrs. Helmsley did just that; the practical effect of this ruling is to perpetuate Helmsley-Spear indefinitely as managing agent of several of New York's most significant commercial properties. (R. 214).

Petitioners promptly moved to vacate those sections of the Award, contending that the FAA should apply and that the challenged portions of the Award were in "manifest disregard" of clear, well-established law that was repeatedly cited to the Panel. Respondent cross-moved to confirm the Award. On July 23, 2001, the Supreme Court, New York County summarily confirmed the Award.

On appeal, petitioners argued both that the FAA should apply and that the Panel's holdings on these issues

should be vacated. In particular, petitioners noted that this dispute clearly implicated interstate commerce: (1) the parties themselves reside in different states (Mr. Malkin, for example, is a Connecticut resident and Helmsley-Spear is a New York corporation, (R. 458-459)); (2) the investors in the partnerships at issue were and are residents of many different states (*see e.g.*, R. 437 (North Carolina), 447 (New York), 454 (New Mexico), 490 (Virginia), 677 (New Jersey), 681 (Massachusetts), 685 (Florida), 693 (Connecticut), 697 (California), 708 (Vermont), 730 (New Hampshire)) and nations (United Kingdom—R. 636); (3) the partnership votes at issue were solicited and received from investors throughout the United States (*e.g.*, R. 437, 447, 454, 490, 677, 681, 685, 693, 697, 708, 730) and foreign countries (R. 636), using instrumentalities of interstate and foreign commerce; and (4) the dispute as a whole—relating as it does to Helmsley-Spear's efforts to lease office and showroom space in New York City to national and international tenants, to engage employees, services and supplies daily across a tri-state area, and to operate the Empire State Building observatory for several million annual visitors from around the globe—necessarily raised myriad issues directly affecting interstate commerce.

On December 5, 2002, the Appellate Division affirmed the lower court's judgment and confirmed the Award. Rejecting petitioners' argument that the FAA applied, the court held that "[I]nasmuch as the dispute at issue, arising from the termination of defendant as managing agent at buildings located within the City of New York, does not have a substantial effect on interstate commerce, the Federal Arbitration Act does not apply." (Appendix 1a). Accordingly, the court declined to consider whether the challenged aspects of the Award were in "manifest disregard of the law".

Rather, applying state law standards—which require a finding of outright irrationality before an arbitration award may be vacated—the court concluded that:

> [T]he arbitration panel's findings that the proxy solicitation process was impaired, that the Voting Agreement executed by Leona Helmsley did not violate Partnership Law § 53(1), and that the assignment to Newco was not an assignment of a personal services contract, *while perhaps questionable*, were not so arbitrary as to warrant vacatur.

Id. (emphasis added).

Petitioners timely applied for leave to appeal to the New York Court of Appeals. In their petition, petitioners again emphasized that the operation of these buildings unquestionably affects interstate commerce: the Empire State Building alone, for example, sells millions of tickets to national and international visitors every year and operates antenna and transmission facilities for television and radio programming across the tri-state area, while the International Toy Center has for decades been the principal location for the Annual American International Toy Fair, the largest event of its kind drawing thousands of buyers and sellers each year from around the world. Petitioners also noted that the Appellate Division had applied the wrong legal standard in determining whether to apply the FAA:

> The Appellate Division, however, held here, without elaboration, that "the dispute at issue . . . does not have a substantial effect on interstate commerce." Here, again, the Court misstated the

> applicable standard: the clear weight of authority holds that the reach of the FAA "extends to any contract affecting commerce", *not* only to those matters that have a "substantial effect on interstate commerce", and that to read the Supreme Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995) as rejecting or modifying the clear holding of the *Allied-Bruce* case establishing the jurisdictional reach of the FAA, as the Appellate Division evidently did, is simply wrong.

(Petitioners' January 13, 2003 Memorandum of Law in Support of Motion for Leave to Appeal at 14.)

Petitioners also noted that the Appellate Division's failure to apply the correct standard to its review of the Award had real consequences, given the court's clearly expressed misgivings about the Award: the Appellate Division had attempted to clarify one particularly bizarre aspect of the Panel's holding—that that a principal owes a fiduciary duty to its agent—and noted that the Panel's other rulings were "perhaps questionable".

On April 8, 2003, the New York Court of Appeals denied petitioners' motion for leave to appeal.

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

This petition should be granted for two reasons. *First*, as this Court recently confirmed in *Circuit City*, the Appellate Division misstated and misapplied Supreme Court precedent and therefore determined—erroneously—that the

FAA does not apply to this dispute. *Second*, as the balance of its decision demonstrates, the Appellate Division's error was almost certainly outcome determinative. The Court should remand this case so that the Appellate Division can determine whether the FAA applies using the correct legal standard, and, if so, whether the Award was made in manifest disregard of the law. *See New York Telephone Co. v. Communications Workers of America Local 1100*, 256 F.3d 89, 91 (2d Cir. 2001).

In *Citizens Bank v. Alafabco, Inc.*, 123 S. Ct. 2037 (*per curiam*) (June 2, 2003), this Court expressly rejected the legal premise on which the Appellate Division based its refusal to apply the FAA: that the FAA only applies when the "relevant transactions . . . by themselves [] ha[ve] a 'substantial effect on interstate commerce'". 123 S. Ct. at 2039 (quoting *Alafabco, Inc. v. Citizens Bank*, 2002 WL 1998268 at * 3, *5 (Ala., Aug. 30, 2002)). The Supreme Court of Alabama had employed this standard based on its view that *United States v. Lopez*, 514 U.S. 549 (1995), required that "'a particular contract, in order to be enforceable under the Federal Arbitration Act must, by itself, have a substantial effect on interstate commerce.'" *Id.* (quoting *Alafabco, Inc. v. Citizens Bank* at * 11).

Noting the Alabama court's "improperly cramped view of Congress' Commerce Clause power", *id.* at 2041, this Court squarely rejected that view, holding that "*Lopez* did not restrict the reach of the FAA or implicitly overrule" *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (holding that the FAA applies to written arbitration provisions in all transactions "affecting commerce"). *Id.* at 2040. Rather, the Court reiterated that:

> Congress' Commerce Clause power "may be exercised in individual cases without showing any specific effect upon interstate commerce" if in the aggregate the economic activity in question would represent "a general practice . . . subject to federal control."

Id. (citations omitted). Applying this standard, the Court determined that the debt restructuring agreements at issue in *Citizens Bank* clearly "involv[ed] commerce", requiring the application of the FAA. *Id.*

In light of *Citizens Bank*, this Court would be fully justified in vacating the decision below and remanding with instructions to apply the FAA: it is difficult to see how the management and operation of eight million square feet of commercial property in New York City by partners located throughout the United States and foreign countries is not "involving commerce" within the meaning of the FAA. *Cf. Citizens Bank*, 123 S. Ct. at 2040 ("the Commerce Clause gives Congress the power to regulate local business establishments purchasing substantial quantities of goods that have moved in interstate commerce") (citing *Katzenbach v. McClung*, 379 U.S. 294 (1964)).

However, even if this Court permits the New York court to make that determination in the first instance, it is critically important that the Court vacate and remand the decision below, since the New York court's failure to apply the FAA was likely outcome determinative: as explained above, the Panel unblinkingly upheld both the unconsented assignment of personal services contracts and Leona Helmsley's undisclosed transfer of her general partner voting rights to an interested non-partner. The New York court recognized

that these holdings were "perhaps questionable" but held that they were not completely irrational, the applicable standard under New York law. Had the court applied the appropriate federal "manifest disregard of the law" standard, the court's own precedents likely would have compelled vacatur. *See, e.g., In re Arbitration Between UBS Warburg LLC and Auerbach, Pollack & Richardson, LLC*, 294 A.D.2d 245, 246, 744 N.Y.S.2d 364, 364 (1st Dep't 2002) (affirming vacatur of commercial arbitration award under FAA when "the arbitral panel manifestly disregarded the applicable law"); *In re Application of Spear, Leeds & Kellogg v. Bullseye Securities, Inc.*, 291 A.D.2d 255, 256, 738 N.Y.S.2d 27, 28 (1st Dep't 2002) (vacating commercial arbitration award under FAA when arbitration panel "exceeded its authority" and rendered award that was "inherently inconsistent"); *Stewart Tabori & Chang v. Stewart*, 282 A.D.2d 385, 386, 723 N.Y.S.2d 492, 494 (1st Dep't 2001) (vacatur of portion of award authorizing attorneys' fees and disbursements was proper on grounds that it was in "manifest disregard of well-defined, explicit and clearly applicable New York law").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT ENTERED DECEMBER 5, 2002

Williams, P.J., Ellerin, Rubin, Marlow, Gonzalez, JJ.

2467

Wien & Malkin, LLP, etc., et al.,

Plaintiffs-Appellants,

-against-

Helmsley-Spear, Inc.,

Defendant-Respondent.

Judgment, Supreme Court, New York County (Ira Gammerman, J.), entered July 23, 2001, which, inter alia, granted the motion by defendant Helmsley-Spear, Inc. to confirm an arbitration award dated March 30, 2001, unanimously affirmed, without costs.

Inasmuch as the dispute at issue, arising from the termination of defendant as managing agent at buildings located within the City of New York, does not have a substantial effect on interstate commerce, the Federal Arbitration Act does not apply (*see United States v Lopez*, 514 US 549, 559; *and see Allied-Bruce Terminix Cos. v Dobson*, 513 US 265, 281-282). Under state law, the award must stand unless shown to be utterly arbitrary or violative of public policy (*see* CPLR 7511; *Matter of Town of Callicoon v Civil Serv. Empls. Assn.*, 70 NY2d 907, 909).

Appendix A

We are not empowered to vacate an award merely for errors of law or fact committed by the arbitrators (*Matter of Sprinzen [Nomberg]*, 46 NY2d 623, 629). Given our very limited scope of review, we conclude that the arbitration panel's findings that the proxy solicitation process was impaired, that the Voting Agreement executed by Leona Helmsley did not violate Partnership Law § 53(1), and that the assignment to Newco was not an assignment of a personal services contract, while perhaps questionable, were not so arbitrary as to warrant vacatur. It may be noted in this connection that the arbitrators' finding that a "fiduciary duty" was owed by the partners to Helmsley-Spear appears not to have been a finding of the existence of such a duty in the strict legal sense, but only a determination that the parties' long-standing relationship warranted adherence to appropriate methodology before termination of Helmsley-Spear's role as managing agent for the various buildings could be effected.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: DECEMBER 5, 2002

s/ Joseph M. Blackman
DEPUTY CLERK

APPENDIX B — JUDGMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK FILED JULY 23, 2001

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 603145/97

IAS Part 27 (Gammerman, J.)

Case No. 12512

WIEN & MALKIN LLP as Supervisor and PETER L. MALKIN, individually and as Partner in and on behalf of EMPIRE STATE BUILDING ASSOCIATES, EMPIRE STATE BUILDING COMPANY, FIFTH AVENUE BUILDING ASSOCIATES, 200 FIFTH AVENUE ASSOCIATES, NAVARRE-500 BUILDING ASSOCIATES, 500-512 SEVENTH AVENUE ASSOCIATES, MARLBORO BUILDING ASSOCIATES 1359 BROADWAY ASSOCIATES, 112 WEST 34TH STREET ASSOCIATES, 112 WEST 34TH STREET COMPANY, SEVENTH AND THIRTY SEVENTY BUILDING ASSOCIATES, 501 SEVENTH AVENUE ASSOCIATES, 60 EAST 42ND STREET ASSOCIATES, LINCOLN BUILDING ASSOCIATES, 250 WEST 57TH STREET ASSOCIATES, FISK BUILDING ASSOCIATES, 1333 BROADWAY ASSOCIATES and 1400 BROADWAY ASSOCIATES,

Plaintiffs,

v.

HELMSLEY-SPEAR, INC.,

Defendant.

Appendix B

JUDGMENT

Defendant Helmsley-Spear, Inc., having moved this Court pursuant to CPLR § 7510, for an order (i) confirming the Partial/ Final Award issued in the arbitration proceedings between defendant Helmsley-Spear, Inc. and plaintiffs Wien & Malkin LLP and Peter L. Malkin (AAA Case Nos. 13 180 00976 97 and 13 180 00964 97), signed and verified on the 30th day of March, 2001 (the "Award") and (ii) directing that judgment be entered thereon; and plaintiffs having cross-moved for an order vacating paragraphs 2, 3, 4, 6, 9 and 10 of the Award and directing related relief; and the motion and cross-motion having come on to be heard at IAS Part 27 of this Court on June 18, 2001; and the Court having rendered its decision on the record as set forth in the certified transcript signed by the Court on June 25, 2001; and the motion to confirm having been granted and the cross-motion to vacate having been denied; and an order having been duly made by Justice Gammerman and entered in the office of the Clerk of this Court on June 20, 2001; and an order directing the entry of judgment having been duly made by Justice Gammerman on July 12, 2001; and defendant having waived the recovery of costs and disbursements;

NOW, on motion of Baer Marks & Upham LLP and Squadron Ellenoff Plesent & Sheinfeld LLP, attorneys for defendant, it is

Appendix B

ADJUDGED that the Award, a copy of which is annexed hereto and incorporated herein by reference, be and the same hereby is confirmed, as follows:

1. The claims of Wien & Malkin LLP and Peter Malkin ("Plaintiffs") to remove Helmsley-Spear, Inc. ("Defendant" or "Helmsley-Spear") as managing agent for cause are denied.

2. The claims of Plaintiffs to remove Defendant as managing agent without cause are denied.

3. The proxies heretofore solicited and obtained by Plaintiffs with a view to using such proxies in any vote to remove Defendant as managing agent for any of the Properties (as that term is defined in the Memorandum of the Arbitrators dated March 30, 2001 [the "memorandum"]) are declared to be null, void and of no effect.

4. All votes or purported votes to terminate Defendant as managing agent for any of the Properties are declared to be null, void and of no effect.

5. All other claims of Plaintiffs including all claims for damages against Defendant are denied.

6. Defendant is declared to be in all respects the legal and valid successor in interest to the former Helmsley-Spear Corporation and to have validly exercised the Option Agreement of 1970 (as that term is described in the memorandum).

Appendix B

7. Defendant is declared to be a third-party beneficiary of all of the partnership agreements involved in this proceeding.

8. It is found and declared that valid action by each partnership in accordance with its respective partnership agreement is required to remove Defendant as managing agent.

9. Plaintiffs are enjoined from contesting the validity or in any way interfering with the Voting Agreement between Leona Helmsley and Helmsley-Spear, dated September 24, 1997, and Plaintiffs are ordered to give full force and effect to that agreement in any future vote to remove Defendant as managing agent.

10. Plaintiffs are enjoined from calling and holding a partnership meeting for the purpose of removing Defendant as managing agent or from soliciting proxies for use for such purpose unless the following procedures are followed:

    (a) Wien & Malkin shall prepare and deliver to Defendant the appropriate proxy material which must be complete and accurate in all respects and consistent with the findings and conclusions of the memorandum at least 180 days prior to the date of any such meeting;

    (b) Defendant shall have 15 days from receipt of the proposed proxy material to request clarification or additional information and 30

days from receipt of the responses to its requests to object to the proxy material;

(c) The parties shall thereafter attempt, in good faith, for a period of 15 days to resolve any objections made by Defendant;

(d) In the event the parties are unable to resolve such objections and disputes, any differences will be submitted to the arbitrators who rendered the memorandum and Award (the "Panel"). The Panel shall, on the basis of the Panel's memorandum and any written submissions made by the parties (without receipt of any additional affidavits, depositions or additional testimony, unless ordered by the Panel for good cause shown), order such changes in the proposed proxy material as may be appropriate.

(e) Wien & Malkin shall cause the proxy material to be sent to all general partners and all other persons entitled to vote at such meeting of any affected partnership at least 60 days prior to the date of any such meeting. At the same time, it shall furnish to Defendant, the names and addresses of all such general partners.

(f) Defendant may produce counter proxy material, which will be subject to the same requirements and procedures as provided in subparagraphs (a) - (d). Defendant shall cause the counter proxy

material to be sent to the persons described in subparagraph (e) at least 30 days prior to the date of such meeting.

(g) Defendant shall be entitled, through its officers, employees, agents and/or attorneys, to attend each such meeting and to participate.

(h) The Panel retains jurisdiction of this dispute for a period of one year from the date of the Award solely for the purposes of this paragraph 10.

(i) If within 30 days of the date of the Award any party objects in writing to the American Arbitration Association to the Panel's retaining jurisdiction pursuant to the preceding subparagraph (h), then subparagraphs (d) and (h) shall be deemed deleted from this paragraph 10.

(j) The time periods specified in this paragraph can be extended by agreement of the parties, by the Panel, if the Panel retains jurisdiction, or if not, by any other competent tribunal.

(k) Except as set forth in the memorandum, the Panel makes no findings with respect to the form or content of any proxy material or counter proxy material to be prepared pursuant to this paragraph.

Appendix B

11. Subparagraphs (d) and (h) of paragraph 10 are deemed deleted by virtue of the April 2, 2001 letter from Plaintiffs' counsel to the American Arbitration Association objecting, pursuant to paragraph 10(i) of the Award, to the Panel's retaining jurisdiction pursuant to paragraph 10(h) of the Award.

12. All claims for attorney's fees are denied.

13. Plaintiffs' claim for punitive damages is denied.

14. The compensation of the Panel shall be borne equally by Plaintiffs and Defendant.

15. The fees of the American Arbitration Association shall be borne equally by the parties.

16. Except as specifically awarded herein, all other counterclaims of Defendant are denied.

17. All other claims of all parties are denied.

18. The Award is in full settlement of all claims submitted.

Judgment signed and entered this 23 day of July, 2001.

s/ Norman Goodman
Clerk

APPENDIX C — PARTIAL/FINAL AWARD

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance the the arbitration agreements entered into between the above named parties and having been duly sworn, and having duly heard the proofs and allegations of the parties, and for the reasons set forth above, do hereby AWARD as follows:

1. The claims of Wien & Malkin LLP and Peter Malkin ("Claimants") to remove Helmsley-Spear, Inc. ("Respondent" or "Helmsley-Spear") as managing agent for cause are denied.

2. The claims of Claimants to remove Respondent as managing agent without cause are denied.

3. The proxies heretofore solicited and obtained by Claimants with a view to using such proxies in any vote to remove Respondent as managing agent for any of the Properties are declared to be null, void and of no effect.

4. All votes or purported votes to terminate Respondent as managing agent for any of the Properties are declared to be null, void and of no effect.

5. All other claims of Claimants including all claims for damages against Respondent are denied.

6. Respondent is declared to be in all respects the legal and valid successor in interest to the former Helmsley-Spear Corporation and to have validly exercised the Option Agreement of 1970.

Appendix C

7. Respondent is declared to be a third-party beneficiary of all of the partnership agreements involved in this proceeding.

8. We find and declare that valid action by each partnership in accordance with its respective partnership agreement is required to remove Respondent as managing agent.

9. Claimants are enjoined from contesting the validity or in any way interfering with the Voting Agreement between Leona Helmsley and Helmsley-Spear, dated September 24, 1997 and Claimants are ordered to give full force and effect to that agreement in any future vote to remove Respondent as managing agent.

10. Claimants are enjoined from calling and holding a partnership meeting for the purpose of removing Respondent as managing agent or from soliciting proxies for use for such purpose unless the following procedures are followed:

    (a) Wien & Malkin shall prepare and deliver to Respondent the appropriate proxy material which must be complete and accurate in all respects and consistent with the findings and conclusions of this memorandum at least 180 days prior to the date of any such meeting;

    (b) Helmsley-Spear shall have 15 days from receipt of the proposed proxy material to request

clarification or additional information and 30 days from receipt of responses to its requests to object to the proxy material;

(c) The parties shall thereafter attempt, in good faith, for a period of 15 days to resolve any objections made by Helmsley-Spear;

(d) In the event the parties are unable to resolve such objections and disputes, any differences will be submitted to the Panel. The Panel shall, on the basis of the Panel's memorandum and any written submissions made by the parties (without receipt of any additional affidavits, depositions or additional testimony, unless ordered by the Panel for good cause shown), order such changes in the proposed proxy material as may be appropriate.

(e) Wien & Malkin shall cause the Proxy material to be sent to all general partners and all other persons entitled to vote at such meeting of any affected partnership at least 60 days prior to the date of any such meeting. At the same time, It shall furnish to Respondent the names and addresses of all such general partners.

(f) Respondent may produce counter proxy material, which will be subject to the same requirements and procedures as provided in subparagraphs (a)-(d). Respondent shall cause the counter proxy material to be sent to the

persons described in subparagraph (e) at least 30 days prior to the date of such meeting.

(g) Respondent shall be entitled, through its officers, employees, agents and/or attorneys, to attend each such meeting and to participate.

(h) The Panel retains jurisdiction of this dispute for a period of one year from the date of the award solely for the purposes of this paragraph 10.

(i) If within 30 days of the date of this award any party objects in writing to the American Arbitration Association to the Panel's retaining jurisdiction pursuant to the preceding subparagraph (h), then subparagraphs (d) and (h) shall be deemed deleted from this paragraph 10.

(j) The time periods specified in this paragraph can be extended by agreement of the parties, by this Panel, if we retain jurisdiction or if not, by any other competent tribunal.

(k) Except as set forth in the preceding memorandum, we make no findings with respect to the form or content of any proxy material or counter proxy material to be prepared pursuant to this paragraph.

11 All claims for attorney's fees are denied.

12. Claimants' claim for punitive damages is denied.

13. The compensation of the arbitrators shall be borne

equally by the Claimants and the Respondent.

14. The fees of the American Arbitration Association shall be borne equally by the parties.

15. Except as specifically awarded herein, all other Counterclaims of Respondent are denied.

16. All other claims of all parties are denied.

17. This Award is in full settlement of all claims submitted.

s/ William L. D. Barrett 3/30/01
William L. D. Barrett, Esq. /dated

Nicholas deB. Katzenbach, Esq. /dated

s/ John H. Wilkinson 3/30/01
John H. Wilkinson, Esq. /dated

APPENDIX D — ORDER OF THE STATE OF NEW YORK, COURT OF APPEALS DENYING MOTION FOR LEAVE TO APPEAL DATED APRIL 8, 2003

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eighth day of April 2003

Present, HON. GEORGE BUNDY SMITH, *Senior Associate Judge, presiding.*

1-10

Mo. No. 70

Wien & Malkin, LLP, &c., et al.,

Appellants,

v.

Helmsley-Spear, Inc.,

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Appendix D

ORDERED, that the said motion be and the same hereby is denied. Chief Judge Kaye took no part.

s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

No. 03-54

FILED
AUG 6 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

WIEN & MALKIN LLP, as Supervisor and PETER L. MALKIN, individually and as Partner in and on behalf of EMPIRE STATE BUILDING ASSOCIATES, EMPIRE STATE BUILDING COMPANY, FIFTH AVENUE BUILDING ASSOCIATES, 200 FIFTH AVENUE ASSOCIATES, NAVARRE-500 BUILDING ASSOCIATES, 500-512 SEVENTH AVENUE ASSOCIATES, MARLBORO BUILDING ASSOCIATES, 1359 BROADWAY ASSOCIATES, 112 WEST 34TH STREET ASSOCIATES, 112 WEST 34TH STREET COMPANY, SEVENTH AND THIRTY-SEVENTH BUILDING ASSOCIATES, 501 SEVENTH AVENUE ASSOCIATES, 60 EAST 42ND STREET ASSOCIATES, LINCOLN BUILDING ASSOCIATES, 250 WEST 57TH STREET ASSOCIATES, FISK BUILDING ASSOCIATES, 1333 BROADWAY ASSOCIATES, 1350 BROADWAY ASSOCIATES, and 1400 BROADWAY ASSOCIATES,

Petitioners,

—against—

HELMSLEY-SPEAR, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION—FIRST DEPARTMENT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

RANDY PAAR
Counsel of Record
HOWARD GRAFF
ALEXANDER D. WIDELL
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Attorneys for Respondent

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction over the state court judgment, pursuant to 28 U.S.C. § 1257(a), where Petitioners failed to properly set up their claimed federal right (specifically, the application of the Federal Arbitration Act (the "FAA")) during a four year arbitration and related state court proceeding, where Petitioners affirmatively litigated under the New York State court's arbitration rules and procedures, and where Petitioners first raised the applicability of the FAA as an afterthought after they had lost the arbitration?

2. Whether, even if the FAA applied, the findings of the arbitration panel (which included a former United States Attorney General) as embodied in a comprehensive 134-page arbitration award were in "manifest disregard of the law"?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Helmsley-Spear, Inc. submits that it has no parent company, and that no publicly held company owns 10% or more of its stock.

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Respondent, Helmsley-Spear, Inc., respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Decision and Order of the Supreme Court, Appellate Division, of the State of New York. That Decision and Order is reported at 300 A.D.2d 32, 751 N.Y.S.2d 21 (1st Dep't 2002).

STATEMENT OF THE CASE

Respondent Helmsley-Spear, Inc. ("Helmsley-Spear"), the well-known real estate management firm, is the managing agent of several commercial buildings in New York City that were the subject of the underlying arbitration and lawsuit (the "Buildings"). In a comprehensive 134-page arbitration award (the "Award"), a panel of distinguished arbitrators (the "Panel")—which included former United States Attorney General Nicholas deB. Katzenbach—denied the claims of petitioners Wien & Malkin LLP and Peter L. Malkin ("Petitioners") to terminate Helmsley-Spear as the managing agent of the Buildings—both for "cause" and without cause by vote of the partnerships that own or operate the Buildings. Properly refusing to second-guess the factual and legal determinations of the Panel, the lower court denied Petitioners' motion to vacate that portion of the Award that denied their "without cause" claims. (Petitioners properly elected not to challenge the Panel's findings that Petitioners failed to prove that Helmsley-Spear should be terminated for cause.)

In light of the comprehensive nature of the Award, no detailed factual recitation is required here. Rather, Respondent respectfully refers this Court to the carefully considered analysis—both factual and legal—of the Panel. (R 88-227.) We do, however, briefly address the underpinnings of two issues that Petitioners contend are "central" to their lower court appeals: (i) the Panel's upholding

of a voting agreement between Helmsley-Spear and Leona Helmsley, whereby Mrs. Helmsley agreed to vote against the termination of Helmsley-Spear as managing agent (the "Voting Agreement"); and (ii) the Panel's upholding of an alleged assignment to Helmsley-Spear of certain property management contracts. (*See* Petition at 3.) The Panel fully considered these issues.

Petitioners contended that the Voting Agreement was an invalid transfer of voting rights to a non-partner in violation of New York partnership law. (Petition at 3-4.) The contested issue of the Voting Agreement's validity was squarely presented to the Panel. (*See* R. 1347-49; R. 1447-48.) The Panel unambiguously addressed and resolved the issue:

> As a part of the transaction under which the option agreement was exercised, Mrs. Helmsley agreed under a voting agreement (the "Voting Agreement") between Leona Helmsley and Helmsley-Spear, dated September 24, 1997, to take all actions necessary—including voting her partnership interests in the Partnerships—to maintain Helmsley-Spear as the managing agent of those Partnerships. . . . Claimants argue that the Voting Agreement violates Section 53(1) of the New York Partnership Law because it gives Helmsley-Spear, a non-partner, irrevocable authority to vote Mrs. Helmsley's interest or to require her to vote issues as directed by a non-partner. . . .
>
> . . . .
>
> We disagree. The option agreement is of long standing, and plainly contemplated that Mr. Schneider and Mr. Schwartz would continue the Helmsley management of Helmsley-Spear. Mrs. Helmsley, as successor to Harry Helmsley, is merely carrying out that intention. Retention of Helmsley-Spear by the

> partnerships was something that Wien & Malkin as counsel built into each agreement to ensure that Helmsley-Spear would continue to be the managing agent. Indeed, it appears that Mr. Wien was concerned that Helmsley-Spear (or its successor) might fall into the hands of another third party, *i.e.*, if Irving Schneider did *not* exercise the option. After Mr. Schneider offered to accelerate, if possible, the option, Mr. Wien ultimately represented that he would not change the managing agents at the Garment Center Buildings as long as they were under Mr. Schneider's supervision. In 1992, Peter Malkin settled a previous arbitration seeking removal of Helmsley-Spear when assured that Messrs. Schneider and Schwartz would be active in its management.
>
> For these reasons we do not think that Section 53(1) of the New York Partnership law mandates the result that Claimants seek, ...

(R. 211-13.)

Petitioners' contention that the effect of the Panel's determination "is to perpetuate Helmsley-Spear indefinitely as managing agent" (*see* Petition at 4) is also wrong. The Voting Agreement itself contemplates that the level of service provided by Helmsley-Spear remain consistent. Thus, Mrs. Helmsley agreed to do precisely what was always envisioned by the parties: to retain Helmsley-Spear as managing agent and retain Irving Schneider as the executive at the Buildings; conversely, it was understood that Helmsley-Spear would maintain the level of management that had returned such spectacular results to the investors over 50 years. The Panel found these facts to be salient:

> Here, there is no claim that Helmsley-Spear seeks to become a partner, merely that Mrs. Helmsley, who

> is concededly a partner, agrees to vote to continue the existing relationship with the managing agent. This case, where a partner agrees to vote on a specific limited issue that has been considered of benefit to the partnership and is a part of the way it has done business for decades, *appears to be one of first impression*. We think it would vitiate the purpose of the option agreement not to give effect to the Voting Agreement. Although Claimants would surely disagree, the Voting Agreement as an aid to the option agreement furthers the interests of the partnership and the continuity of its business.

(R. 213-14 (emphasis added).)

With respect to the second "central" issue, Petitioners contended in the Arbitration that Helmsley-Spear acquired certain property management contracts, by way of an impermissible assignment. (*See* R. 209-10.) Again, that issue was hotly contested (*see* R. 1406-17), and the Panel soundly rejected Petitioners' contention:

> This analysis must start with our conclusion that Newco, renamed Helmsley-Spear, Incorporated, the Respondent in this case is the valid successor in interest of Helmsley-Spear, Incorporated. It achieves that status by virtue of an option agreement of 1970.
>
> In 1970 an option agreement was created which provided Messrs. Schneider and Schwartz the option to purchase the Helmsley's interest in Helmsley-Spear. Wien & Malkin drafted that agreement as well as the August 1974 and May 1977 amendments thereto. . . .
>
> The option agreements contemplated that Mr. Schneider and Mr. Schwartz would purchase the shares of Helmsley-Spear held by the Helmsleys

> after certain assets unrelated to the management and brokerage business had been removed. The parties to the 1997 transaction cast it as a purchase of the assets of the existing Helmsley-Spear corporation rather than a purchase of its stock. We are persuaded this change was merely one of form, done for tax reasons having to do with certain "parked" properties that are unrelated to the issues in this case. Claimants have not persuaded us that the change of form had any other consequences to the parties, to the partnerships or to Wien & Malkin. We find that the change of form is not a breach of any duty Helmsley-Spear owed to the partnerships and that Claimants' efforts to elevate this technical matter to a nullification of Helmsley-Spear's rights are without merit.

(R. 209-10.)[1]

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[1] In any event, not only was Helmsley-Spear a proper contractual and legal successor, but an assignment under the conditions identified by the Panel would have been proper because personal service contracts *may* be validly assigned where the alleged personal services continue to be rendered by the same or similar individual. *See Lipman v. Haeuser Shellac Co.*, 289 N.Y. 76, 43 N.E.2d 817 (1942) (agreement to arbitrate with corporation whose president discontinued doing business as corporation and operated business as individual was valid and enforceable due to similarity in operations); *In re Vann*, 78 A.D.2d 255, 434 N.Y.S.2d 365 (1st Dep't 1980) (rationale underlying prohibition of assignment of personal service contract inapplicable where the post-assignment services continue to be rendered in same manner as before assignment), *aff'd*, 54 N.Y.2d 936, 429 N.E.2d 817, 445 N.Y.S.2d 139 (1981).

REASONS FOR DENYING THE PETITION

I. THE UNITED STATES SUPREME COURT DOES NOT HAVE JURISDICTION TO REVIEW THE STATE COURT DETERMINATION

Contrary to Petitioners' jurisdictional allegation, the Supreme Court does not have jurisdiction to review the state court's determination pursuant to 28 U.S.C. § 1257(a). That provision states:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the grounds of its being repugnant to the Constitution, treaties, or laws of the United States, *or where any* title, *right*, privilege, or immunity *is specially set up or claimed under the* Constitution or the treaties or *statutes of*, or any commission held or authority exercised under, *the United States*.

28 U.S.C.A. § 1257(a) (West, WESTLAW through P.L. 108-59, (excluding P.L. 108-36) approved 7-14-03) (emphases added). In this case, Petitioners do not claim that this Court's jurisdiction is based upon the invalidity of any federal treaty or statute, or state statute. Rather, Petitioners claim that they were denied their federal right to a review of the arbitration Award pursuant to the FAA, and the federal judicially-created "manifest disregard of the law" doctrine.

The requirement that one seeking Supreme Court review of a state court decision must properly and timely "set up" the federal right claimed is a jurisdictional requirement that is strictly enforced. As stated in

the definitive treatise on United States Supreme Court practice:

> The admonition bears repeating "that if you are about to commence litigation [in a state court] in which there may be involved, then or ultimately, a question arising under the Constitution or laws of the United States, you must raise the federal question at the outset and not as an afterthought after you have lost below. By that time you are almost always too late. * * * [U]nless you build the record in your state litigation so that you *do* make a federal case out of it, you not only do not have a rosy chance of review, you don't have any chance at all."

Robert L. Stern et al., *Supreme Court Practice* 168-69 n.49 (8th ed. 2002) (quoting F. Wiener, *Wanna Make A Federal Case Out Of It?*, 48 A.B.A.J. 59, 60, 62 (1962)) (alterations, omission and emphasis in original).

Petitioners failed to timely set up their claimed federal right to FAA review in the state court litigation, and cannot now avail themselves of that purported right by petition to the Supreme Court. Indeed, Petitioners' contention that the arbitration Award should have been reviewed under the FAA (as opposed to review under Article 75 of the New York Civil Practice Law and Rules) is an after-the-fact invention, raised for the first time only after all of their claims were denied by the arbitration Panel. Recognizing as they must that the underlying dispute was a quintessentially localized dispute involving the management of real property in Manhattan by a New York corporation with its principal place of business in New York County,[2] Respondents

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[2] In their appeal to the Appellate Division, the *only* fact Petitioners relied upon to support their invocation of the FAA was the fact that the parties (or principals of parties) are from different states. As the Appellate Division recognized, that fact alone is not a sufficient

themselves proceeded under Article 75 of the CPLR from the very inception of the arbitration. Thus:

- In 1997, after Petitioners commenced the underlying dispute in New York Supreme Court, Respondent moved to compel arbitration pursuant to CPLR § 7503. (R.1479.) In opposing the motion, *Petitioners never argued that the FAA applied.* To the contrary, *every case they cited* in opposition to the motion was decided under the CPLR. (R. 1483.)
- While opposing the motion to compel, Petitioner argued to the lower state court that the injunctive relief they had previously sought under Article 63 of the CPLR would also be available to them as an injunction in aid of arbitration pursuant to CPLR § 7502. (R. 1484.) This remedy is not available under the FAA. (R. 1484.)
- In 1998, while discovery was proceeding in the arbitration, Petitioners sought from the Panel a partial/final award terminating Respondent at five of the eleven Buildings at issue. In arguing that the Panel had the authority to grant the relief requested, Petitioners relied on cases decided under Article 75 of the CPLR, and

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basis for application of the FAA. *See Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 76 S. Ct. 273, 100 L. Ed. 199 (1956), *cited with approval in Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1955). In the instant application, Petitioners also allege that "national and international tenants" lease office and showroom space in the Buildings. (Petition at 5.) Similarly, Petitioners allege here that people from around the world visit the Empire State Building. *Id.* Apart from whether these allegations even demonstrate that the arbitral dispute has an effect on interstate commerce, these arguments were not presented to the Appellate Division or the lower court and cannot be raised here for the first time.

expressly told the Panel that "[t]here is no requirement in CPLR § 7510, *which governs confirmation of an arbitral award*, that a party have a final resolution of all issues prior to seeking confirmation. . . . " (R. 1487 (emphasis added).)

- When they brought an application before the lower state court in 2002 long after the conclusion of the Arbitration—to "confirm partnership votes"—without purchasing an index number and commencing a new plenary action, Petitioners agued that it was merely enforcing the arbitration Award, *and that a recent amendment to Article 75 of New York's CPLR* rendered the filing of a new action unnecessary.
- Petitioners did not raise the possible application of the FAA until 2001, as part of their cross-motion to vacate the Award in part. Even then, they argued that *both* the CPLR and the FAA supported vactatur.

For these reasons, the federal question was not properly set up and claimed, and the Supreme Court does not have jurisdiction over the state court judgment pursuant to 28 U.S.C. § 1257(a).

II. APPLICATION OF THE FAA WOULD NOT CHANGE THE OUTCOME

Eager to keep this litigation alive, Petitioners contend that the Appellate Division's failure to apply the FAA's "manifest disregard of the law" "was almost certainly outcome determinative." (Petition at 8.) Petitioners are wrong.[3] Even if the FAA applied to this case, the Panel

[3] As a threshold issue, this Court need not even address Petitioners' contention that the Award should have been reviewed under the

did not act in manifest disregard of the law and the reviewing courts would have confirmed the Award. The 134-page Award demonstrates that the Panel afforded careful consideration to all of the parties' factual and legal contentions, and reflects a sophisticated analysis, as well as a complete and comprehensive understanding of both the proof adduced and the law.

The sole basis of Petitioners' argument that the application of the FAA to the Voting Agreement and management contract issues "was almost certainly outcome determinative" is the First Department's statement that the Panel's rulings in those respects were "perhaps questionable." (Petition at 7-8.) Petitioners' reliance on the "perhaps questionable" language, however, represents a fundamental misunderstanding of the nature and severely circumscribed application of the "manifest disregard of the law" doctrine, as explained in two recent Second Circuit decisions.

In *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200 (2d Cir. 2002) and *Duferco International Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383 (2d Cir. 2003), the Second Circuit reaffirmed that the "standard

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standards set forth in the FAA. This is so because "this State's [New York's] body of arbitration law would apply as it is not inimical to the policies of the FAA." *In re Ball (SFX Broad. Inc.)*, 236 A.D.2d 158, 160, 665 N.Y.S.2d 444, 446 (3d Dep't 1997), citing the New York Court of Appeals' decision in *Smith Barney, Harris Upham & Co. v. Luckie*, 85 N.Y.2d 193, 205, 647 N.E.2d 1308, 1315, 623 N.Y.S.2d 800, 807 (1995). In *Smith Barney*, the New York Court of Appeals (the State's highest court) noted that "the FAA was modeled after New York's arbitration law" and held that "no significant distinction can be drawn between the policies supporting the FAA and the arbitration provisions of the CPLR." *Id.* at 205-06, 647 N.E.2d at 1315, 623 N.Y.S.2d at 807. Thus, because the policies underlying the FAA and CPLR are consistent, and because, as described herein, application of the FAA would have *no* effect on the outcome of this case, there is no basis to assert—as Petitioners appear to have done—FAA preemption.

of review under this judicially created doctrine is 'severely limited.' " *Westerbeke*, 304 F.3d at 208; *Duferco*, 333 F.3d at 389.[4] Fatal to Petitioner's application, both *Westerbeke* and *Duferco* reiterated that the manifest disregard doctrine "has both an objective and a subjective component." *Westerbeke*, 304 F.3d at 209; *Duferco*, 333 F.3d at 390. Thus, in *Westerbeke*, the Second Circuit held that in addition to being "utterly arbitrary" or "totally irrational" (essentially, the CPLR test applied by the Appellate Division), vacatur under the manifest disregard standard requires a component of arbitral misconduct:

> It is not enough that the moving party provide proof that the arbitrator was aware of the governing legal principle; there must also be a showing of intent. *See DiRussa*, 121 F.3d at 821-22 (explaining that the arbitrator must either knowingly "refuse[ ] to apply" or intentionally disregard[ ]" governing law). A party seeking vacatur must therefore demonstrate that the arbitrator knew of the relevant principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it. *See Merrill Lynch*, 808 F.2d at 933 ("[T]he term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it.").

304 F.3d at 217 (alterations in original).[5]

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[4] Indeed, there is a split among the federal circuits as to whether the "manifest disregard of the law" doctrine is even available as a basis for vacatur. *See Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1994) (judicially created doctrine of manifest disregard is not a proper basis to challenge an arbitral determination).

[5] *See also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933-34 (2d Cir. 1986) (citations omitted);

In *Duferco*, the Second Circuit made it clear that it meant what it said in *Westerbeke*, when it said that the standard of review was "severely limited." 333 F.3d at 389. As the Court explained:

> Our reluctance over the years to find manifest disregard is a reflection of the fact that it is a doctrine of last resort—its use is limited only to those exceedingly rare instances where some *egregious impropriety* on the part of the arbitrators is apparent, but where none of the provisions of the FAA apply. It should be remembered that arbitrators are hired by the parties to reach a result that conforms to industry norms and to the arbitrator's notions of fairness. To interfere with this process would frustrate the intent of the parties, and thwart the usefulness of arbitration, making it "the commencement, not the end, of litigation."
>
> . . . .
>
> [I]t is not our role to substitute our judgment for those of the arbitrators hired by the parties—this is why our standard for vacatur is so very high. We review only for a *clear demonstration* that the panel *intentionally* defied the law.

Siegel v. Titan Indus. Corp., 779 F.2d 891, 892 (2d Cir. 1985) (manifest disregard of the law requires " 'something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law' "); *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 821 (2d Cir. 1997) (in order to modify or vacate an award on manifest disregard grounds, "a court must find both that (1) 'the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether,' and (2) the 'law ignored by the arbitrators . . . [was] "well defined, explicit, and clearly applicable to the case" ' "), *cert. denied*, 522 U.S. 1049, 118 S. Ct. 695, 139 L. Ed. 2d 639 (1998) (quoting *Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 112 (2d Cir. 1993)) (omission and alteration in original).

Id. at 389, 392-93 (quoting *Burchell v. Marsh*, 58 U.S. 344, 349, 15 L. Ed. 96 (1854)) (emphases added).

Application of the above standard to this case shows that the further adjudication Petitioners seek would be frivolous. For example, it is difficult to understand how Petitioners can even suggest that the Panel's ruling with respect to the Voting Agreement with Leona Helmsley constituted a manifest disregard of the law. (Petition at 9-10.) After careful analysis, the Panel found they were confronted with an issue of "first impression." (R. 213.) If the Panel believed that to be so—a Panel that consisted of three distinguished attorneys, including former United States Attorney General Nicholas deB. Katzenbach—it cannot be genuinely argued that this belief constituted any "egregious impropriety" or that the Panel *intentionally* refused to apply a well-defined and clearly governing principle of law that was known to them. That Petitioners have not validly challenged the Panel's evaluation that this issue presented a case of first impression simply underscores the complete inapplicability of the manifest disregard standard here.

Petitioners' argument fares no better with respect to the management agreements—which Petitioners contend were personal service contracts that were impermissibly assigned to Helmsley-Spear. (R. 42-45.) The Panel determined, however, *as a factual matter*, that Helmsley-Spear was a valid successor in interest—*not* an assignee—to those agreements. (R. 209.) Petitioners may disagree with this finding, but they cannot contend that the Panel committed an egregious impropriety—much less "intentionally defied the law"—in reaching this conclusion. Thus, the manifest disregard of the law doctrine, even if it were the applicable standard, would have no application to the Panel's decision with respect to this issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

WIEN & MALKIN LLP as Supervisor and PETER L. MALKIN, individually and as Partner in and on behalf of EMPIRE STATE BUILDING ASSOCIATES, EMPIRE STATE BUILDING COMPANY, FIFTH AVENUE BUILDING ASSOCIATES, 200 FIFTH AVENUE ASSOCIATES, NAVARRE-500 BUILDING ASSOCIATES, 500-512 SEVENTH AVENUE ASSOCIATES, MARLBORO BUILDING ASSOCIATES 1359 BROADWAY ASSOCIATES, 112 WEST 34TH STREET ASSOCIATES, 112 WEST 34TH STREET COMPANY, SEVENTH AND THIRTY SEVENTY BUILDING ASSOCIATES, 501 SEVENTH AVENUE ASSOCIATES, 60 EAST 42ND STREET ASSOCIATES, LINCOLN BUILDING ASSOCIATES, 250 WEST 57TH STREET ASSOCIATES, FISK BUILDING ASSOCIATES, 1333 BROADWAY ASSOCIATES and 1400 BROADWAY ASSOCIATES,

Petitioners,

v.

HELMSLEY-SPEAR, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION – FIRST DEPARTMENT

REPLY BRIEF

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PRELIMINARY STATEMENT

Nowhere in Respondent Helmsley-Spear's Reply Brief ("Resp. Br.") does Helmsley-Spear come to grips with the following undisputed facts:

- The New York courts expressly refused to apply federal law to review of the arbitration award at issue;

- Their sole legal basis for refusing to apply federal law—that the Federal Arbitration Act ("FAA") does not apply unless the conduct at issue has a "substantial effect" on interstate commerce—has been definitively established by this Court to be erroneous, *Citizens Bank v. Alafabco, Inc.*, 123 S. Ct. 2037 (June 2, 2003) (*per curiam*);

- It is beyond cavil—and even Helmsley-Spear does not seriously dispute—that the operation of the properties at issue, which include the Empire State Building, "affects" interstate commerce, requiring application of the FAA;

- Though the New York Court recognized that the arbitration panel's findings were "perhaps questionable", it affirmed confirmation of the award only because, in its view, the arbitration panel's errors were not "utterly arbitrary or violative of public policy"—the applicable (and extremely deferential standard) applicable under state law; and

- The same New York Court—when it *has* applied federal law—has vacated arbitral awards that exhibit precisely the same "manifest disregard" of the law exhibited by the arbitration award at issue. *See, e.g., Sawtelle v. Waddell & Reed, Inc.*, 304 A.D.2d 103, 754 N.Y.S.2d 264, (1st Dep't 2003); *In re Application of Spear, Leeds & Kellogg v. Bullseye Securities, Inc.*, 291 A.D.2d 255, 738 N.Y.S.2d 27 (1st Dep't 2002); *In re Arbitration Between UBS Warburg LLC and Auerbach, Pollack & Richardson, LLC*, 294 A.D.2d 245, 744 N.Y.S. 2d 364 (1st Dep't 2002); *Stewart Tabori & Chang v. Stewart*, 282 A.D.2d 385, 723 N.Y.S.2d 492 (1st Dep't 2001).

In short, we respectfully submit that the writ should be granted, the decision below vacated, and the case remanded to the Appellate Division so that that court can apply the correct legal standard to review of an arbitration award that even the arbitration panel recognized is "of enormous importance not just to the parties but to a significant portion of the New York City business community".

Neither of Helmsley-Spear's two purported bases for denying the writ should affect this outcome. *First*, even though the New York state courts expressly refused to apply federal law based on an erroneous interpretation of the relevant federal statute, Helmsley-Spear nonetheless argues that this Court lacks jurisdiction, allegedly because Petitioners somehow waived the fact that the operation of these partnerships affects interstate commerce. (Resp. Br. 6-8). This is nonsense: most simply—and dispositively—Helmsley-Spear presented this same "waiver" argument to the state courts, which rejected it and ruled "on the merits" that federal law did not apply. (August 14, 2002 Brief of Defendant-Respondent at 37-38). *See, e.g., Ocala*

Star-Banner Co. v. Damron, 401 U.S. 295, 299 n.3 (1971) (rejecting argument that constitutional issue was not properly before Court "since both the trial court on motion for new trial and the state appellate court considered and passed upon the constitutional question as though properly raised").

And the state court determination that no "waiver" had occurred was in any event exactly right: Petitioners timely raised the applicability of federal law in both the state trial and appellate courts. Simply put, the fact that Petitioners have also cited state laws applicable to arbitration, such as a state procedural rule requiring consolidation of proceedings relating to an arbitration (CPLR § 7502), could not and did not "waive" the applicability of the FAA to review of an matters that plainly and substantially affect interstate commerce.

Second, Helmsley-Spear contends that "application of the FAA would not change the outcome". (Resp. Br. 9). Initially, of course, this is a judgment that the New York court that is familiar with the record in this case can and should be given the opportunity to make on remand. And here, too, there is every reason to believe that Helmsley-Spear is wrong: the New York court has already expressed misgivings concerning the Award, terming its key findings "perhaps questionable"; contrary to Helmsley-Spear's suggestion, the federal standard of review—while still rigorous—does permit vacatur when an arbitration panel has manifestly disregarded the law, a basis for vacatur that does *not* exist under state law; and the fact that the panel chose to ignore (for example) the clearly established law mandating that the affairs of a partnership be managed by the partners by treating Leona Helmsley's conduct as an issue "of first impression" only confirms the necessity that this award be reviewed under the correct legal standard.

The judgment below should be vacated and the case remanded to the New York courts for further consideration in light of *Citizens Bank*.

REASONS FOR GRANTING THE PETITION

I. THIS COURT HAS JURISDICTION TO REVIEW THE STATE COURTS' REFUSAL TO APPLY FEDERAL LAW

Contrary to Helmsley-Spear's contention, the Court unquestionably does have jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a), for two distinct, independently sufficient reasons. *First*, the state courts themselves rejected Helmsley-Spear's argument that Petitioners had "waived" the application of the FAA—the Appellate Division erroneously determined that the FAA did not apply *not* because of any procedural default by Petitioners but rather because of its (incorrect) view that the dispute had no "substantial effect" on interstate commerce. *Second*, the state courts' determination that no "waiver" had occurred was clearly correct.

First, where, as here, the state courts have themselves reached "the merits" of the federal law issue, the law is clear that this Court's concern with the "proper raising" of the federal question "disappears": as stated in the authority that Respondent itself characterizes as the "definitive treatise on United State Supreme Court practice" (*see* Respondent's Brief at 7), "[w]here the highest state court assumes or hold that a federal question is properly before it and then proceeds to consider and dispose of that issue, the Supreme Court's concern with the proper raising of the federal question in the state courts disappears." Robert L. Stern et al., *Supreme Court Practice* 185 (8th ed. 2002).

That is precisely what occurred here. Petitioners raised the applicability of the FAA in both the state trial and appellate courts, while Respondent argued, just as it does here, that "by proceeding under Article 75 of the CPLR, Appellants have waived their right to proceed under the FAA." (August 14, 2002 Appellate Division Brief of Defendant-Respondent, at 37-38.) The Appellate Division clearly rejected this argument, since it proceeded to address the merits of the issue, erroneously ruling that the FAA did not apply. Thus, the "appellate court necessarily concluded that the federal . . . question had been properly presented, because it ruled . . . on the merits". *New Jersey v. Portash*, 440 U.S. 450, 455 (1979) (where highest state court to rule on merits was intermediate appellate court, case properly was before Supreme Court). *See also Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 299 n.3 (1971) (rejecting argument that constitutional issue was not properly before Court "since both the trial court on motion for new trial and the state appellate court considered and passed upon the constitutional question as though properly raised.")[1]

Second, the state court's conclusion on this issue was plainly correct. As Respondent concedes, Petitioners have argued in favor of applying the Federal Arbitration Act to every court that has considered the issue—to the New York County Supreme Court in Petitioners' motion to vacate the Award; to the Appellate Division in Petitioners' appeal of the lower court's decision to confirm the Award; and to the New York Court of Appeals in Petitioners' application for leave to appeal to that court.

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1. Respondent's argument that the sole basis petitioners gave the Appellate Division for applying the FAA was the fact that the parties are from different states (Resp. Br. at 7 n.2) is simply wrong. *See* September 13, 2002 Reply Br. of Plaintiffs-Appellants at 5-6.

Nor does the fact that Petitioners have also cited state authorities relating to arbitration during the course of this litigation undermine their timely presentation of this federal question. Thus, for example, Respondent makes much of Petitioners' citation to state cases in Petitioners' opposition to Respondent's motion to compel (Resp. Br. 8)—without clarifying that Petitioner was merely *responding* to state law arguments raised by Respondent. Similarly, Respondent cites Petitioners' reliance on a "recent amendment to Article 75 of New York's CPLR" in connection with post-confirmation proceedings (Resp. Br. 9)—without explaining that the amendment in question is a state court *procedural* rule requiring the consolidation of all-arbitration related applications in a single proceeding. (*See* CPLR § 7502).

In short, this Court plainly has jurisdiction to review—and correct—the state courts' erroneous refusal to apply federal law.

II. THOUGH APPLICATION OF THE FAA WILL COMPEL VACATUR OF THE ARBITRATION AWARD, THIS COURT SHOULD LEAVE THAT DETERMINATION TO THE NEW YORK COURT ON REMAND

Implicitly conceding that this dispute *does* require application of the FAA, Respondent next argues that review of the Award under the proper standard could not have affected the outcome. (Resp. Br. 9-13). Of course, this Court need not reach this issue to grant the requested relief—vacatur of the decision below and remand to the New York Court for application of the correct legal standard. However, Respondent's assertion is any event quite wrong, since application of the FAA will all but compel vacatur of this Award.

First, the New York court has already expressed its misgivings about this Award, ruling that the key findings made by the arbitration panel were "perhaps questionable". While Respondent asserts that our citation to this language somehow demonstrates our "misunderstanding" of the "manifest disregard" doctrine (Resp. Br. 10), we have consistently argued that the Panel's actions in this case—upholding the undisclosed assignment of personal services contracts and permitting Mrs. Helmsley to transfer her management rights to an interested non-partner—clearly represent a conscious, knowing refusal to apply well-established law, the essence of the "manifest disregard" doctrine. The fact that the state court was sufficiently troubled by the Panel's actions to note its reservations about the Award—while affirming its confirmation under a state law standard requiring outright irrationality for vacatur—makes it probable that application of the correct standard will affect the result.

Indeed, Respondent's efforts to defend the bizarre results reached by the Panel only further underscore the necessity of further review. Helmsley-Spear argues that "it is difficult to understand how Petitioners can even suggest that the Panel's ruling with respect to the Voting Agreement with Leona Helmsley constituted a manifest disregard of the law" (Resp. Br. 13), relying on the Panel's view that this issue was one of "first impression". Of course, treating any issue that an arbitration panel deems to be one of "first impression" as foreclosing review would place *all* such awards beyond any judicial review, eviscerating the "manifest disregard" standard; and this assertion is particularly amusing given that *both* sides in the case had emphasized the well-established law proscribing what Mrs. Helmsley had done by giving "Newco" her vote on matters relating to retention of the partnerships' managing agent. As Helmsley-Spear itself stated in one of its briefs,

"Under Section 53(1) of the Partnership Law, a partner may not assign management rights". (R. 1169-70). Yet the Panel consciously and deliberately ignored this authority, enabling Mrs. Helmsley to make just such an assignment.

Similarly, Helmsley-Spear attempts to defend the Panel's ruling concerning the undisclosed "assignment" of the contracts to manage the buildings from Helmsley-Spear to "Newco" by now claiming that the Panel concluded that "Newco" was "*not* an assignee". (Resp. Br. 13) (emphasis original). Of course, the document memorializing this transaction on its face "*assigns* to Newco . . . all . . . management agreements and rights" (R. 340) (emphasis added), and in any event the Panel nowhere even mentions or acknowledges the basis principle (repeatedly cited to it) establishing that such contracts simply cannot be transferred *at all*, under whatever guise.

Second, Respondent implies, without quite saying, that the standard of review of arbitration awards under state and federal law is the same, asserting, for example, that "the policies underlying the FAA and the CPLR are consistent". (Resp. Br. 9 n.3).[2] The short answer to this contention is that the Appellate Division has (correctly) not hesitated to vacate, in whole or in part, arbitration awards that are in "manifest disregard" of the law, *e.g. Sawtelle v. Waddell & Reed, Inc.*, 304 A.D.2d 103, 754 N.Y.S.2d 264 (1st Dep't 2003); *In re Application of Spear, Leeds*

2. Respondent also attempts to conflate the federal and state standards of arbitral review by citing *Westerbeke Corp. v. Diahatsu Motor Co.*, 304 F.3d 200 (2d Cir. 2002) for the proposition that vacatur under the manifest disregard standard requires a finding that the award is "'utterly arbitrary' or 'totally irrational' (essentially, the CPLR test applied by the Appellate Division)". (Respondent's Br. at 11). This representation of the *Westerbeke* holding is inaccurate; despite Respondent's misleading use of quotation marks, there is no such language in that case.

& Kellogg v. Bullseye Securities, Inc., 291 A.D.2d 255, 738 N.Y.S.2d 27 (1st Dep't 2002); *In re Arbitration Between UBS Warburg LLC and Auerbach, Pollack & Richardson, LLC*, 294 A.D.2d 245, 744 N.Y.S. 2d 364 (1st Dep't 2002); *Stewart Tabori & Chang v. Stewart*, 282 A.D.2d 385, 723 N.Y.S.2d 492 (1st Dep't 2001), yet has virtually never vacated an award under New York state law on the ground that it is entirely "irrational".

In summary, there is every reason to believe that the Appellate Division's refusal to apply the FAA was outcome-determinative in this case, and the Court should therefore remand to permit that Court to apply the correct body of law to this dispute.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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